SERVED: June 13, 1994

NTSB Order No. EA-4185

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. HERMAN A. REINHOLD, Respondent.	Docket SE-12841

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. HERMAN A. REINHOLD, Respondent.	Docket SE-13003

OPINION AND ORDER

Respondent has appealed from the initial decisions in these two non-consolidated cases.[1] In SE-12841, Administrative Law

[1] Attached is an excerpt from the hearing transcript in SE-12841 containing the oral initial decision issued by Judge Mullins in that case, and a copy of the written initial decision issued by Judge Pope in SE-13003.

Judge William R. Mullins affirmed, in part, an order of the Administrator suspending respondent's commercial pilot certificate based on his alleged violation of 14 C.F.R. 91.111(a), 91.113(d) and (f), and 91.13(a)[2] in connection with an alleged near mid-air collision. Judge Mullins dismissed the 91.113(f) charge, and reduced the requested 180-day suspension to one of 90 days.[3] In SE-13003, Administrative Law Judge William A. Pope, II, affirmed, in its entirety, an order suspending

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[2] 14 C.F.R. 91.111(a) provides as follows:

§ 91.111 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

14 C.F.R. 91.113(d) and (f) provide, pertinent part:

§ 91.113 Right-of-way rules: Except water operations.

* * *

(d) *Converging.* When aircraft of the same category are converging at approximately the same altitude (except head-on, or nearly so), the aircraft to the other's right has the right-of-way.

* * *

(f) *Overtaking.* Each aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right.

Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] The Administrator withdrew his earlier-filed appeal from this initial decision.

respondent's pilot certificate for 270 days based on his alleged violation of 14 C.F.R. 91.111(a), 91.113(b) (e) and (g), and 91.13(a),[4] in connection with three incidents where respondent allegedly created a collision hazard and violated right-of-way rules. For the reasons discussed below, respondent's appeals are denied and both initial decisions are affirmed.

SE-12841

Respondent is employed as chief pilot for the Phoenix Zephyrhills Parachute Center, located at Zephyrhills airport in Zephyrhills, Florida. On October 12, 1991, he piloted a CASA

[4] See footnote 2 for text of sections 91.111(a) and 91.13(a). Subsections (b), (e), and (g) of section 91.113 provide as follows:

§ 91.113 Right-of-way rules: Except water operations.

(b) *General.* When weather conditions permit, regardless of whether an operation is conducted under instrument flight rules or visual flight rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft. When a rule of this section gives another aircraft the right-of-way, the pilot shall give way to that aircraft and may not pass over, under, or ahead of it unless well clear.

(e) *Approaching head-on.* When aircraft are approaching each other head-on, or nearly so, each pilot of each aircraft shall alter course to the right.

(g) *Landing.* Aircraft, while on final approach to land or while landing, have the right-of-way over other aircraft in flight or operating on the surface, except that they shall not take advantage of this rule to force an aircraft off the runway surface which has already landed and is attempting to make way for an aircraft on final approach. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right-of-way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land or to overtake that aircraft.

C-212 aircraft on a flight for the purpose of dropping a group of parachutists over a pre-designated "drop zone" adjacent to the airport. Another aircraft carrying parachutists, operated by a competing skydiving organization and piloted by Edward Lally, took off shortly after respondent. Both pilots were aware of the other's presence, and both knew that they had the same ultimate goal: to drop their skydivers over the parachute drop zone from an altitude of approximately 13,500 feet.

After takeoff, respondent ascended while flying what he described as his company's standard pattern in such operations (north-east-south-west), culminating in an approach to the drop zone at the proper altitude. Mr. Lally flew what amounted to an abbreviated version of respondent's pattern, essentially cutting off the south-east corner of the roughly rectangular pattern, resulting in his reaching the drop zone slightly ahead of respondent, in spite of the fact that he took off some two minutes after respondent and flew at a similar speed. The record establishes that -- respondent's claimed adherence to a standard pattern notwithstanding -- there is no generally accepted pattern that parachute operations are expected or required to fly at this uncontrolled airport.[5]

[5] Though these skydiving operations are conducted in uncontrolled airspace, pilots are required by the Federal Aviation Regulations to communicate with the Tampa air traffic control (ATC) tower to receive traffic advisories prior to dropping their parachutists. Both pilots did so in this case and acknowledged that they had the other aircraft in sight. (Exhibit R-7.)

The near-miss at issue in this case occurred as the two aircraft converged upon the drop zone -- respondent approaching on a westerly heading and Mr. Lally on a south-westerly heading. The aircraft were on converging paths for almost three minutes. Respondent acknowledges that he had Mr. Lally's aircraft in sight from the time that it was three miles away right up until the near-miss. Although Mr. Lally testified at the hearing that he lost sight of respondent's aircraft when they were "a couple of hundred yards" away from each other, his prior statements to the FAA indicated that he had respondent in sight continuously from the time he took off.

As he approached the drop zone, Mr. Lally informed ATC that he was two minutes away from dropping his jumpers. Respondent had made the same announcement some 30 seconds earlier.[6] Respondent thereupon warned Mr. Lally "you better clear or I'll file a near-miss."[7] (Exhibit R-7, transcript of ATC communications.) Respondent's co-pilot, Charles Allen, testified that it was obvious to him that the situation had developed into a "battle of the wills" and that the two pilots were competing to reach the drop zone first. (Tr. 160.) He told respondent he should turn to avoid getting any closer to Mr. Lally's aircraft.

[6] Although pilots are expected to report to ATC two minutes before their jumpers leave the airplane, the testimony established that this broadcast is for ATC traffic advisory purposes only, and does not guarantee the plane any priority over other aircraft which may have declared similar intentions.

[7] Subsequently, respondent did file a complaint with the FAA, claiming that Lally had caused the near-miss.

However, neither pilot gave way. Rather, respondent maintained his heading while Mr. Lally turned his aircraft slightly to the left (towards respondent's aircraft), and the flight paths of the two aircraft crossed. As Mr. Lally's aircraft passed in front of respondent's aircraft, respondent lowered the nose of his aircraft in what he described as an evasive maneuver. Both respondent and his co-pilot stated that they passed through wake turbulence from Mr. Lally's aircraft.

A radar data recording of the relative positions of the two aircraft showed that they came within approximately 2000 feet (horizontally) of each other while at the same altitude. (Tr. 131, 135.) However, the FAA's ATC Quality Assurance Specialist testified that accurate radar data is not received when the aircraft transponders (the source of the radar data) are very close together, and suggested that the aircraft in this case might have gotten closer than the 2000 feet recorded by the computer.[8] Indeed, Mr. Allen, respondent's co-pilot, testified that the two aircraft came within a few hundred feet of each other. (Tr. 161.) Respondent himself, on the day after the incident, told the FAA that the aircraft had come within 200 feet horizontally and 100 feet vertically of one another, and in his written complaint indicated that the distances were 300 feet horizontally and 100-150 feet vertically. (Exhibits A-2 and A-5.) At the hearing, respondent claimed that his earlier

[8] He testified that for two short periods of time during this incident the transponders were so close that no usable data was received.

estimates were inaccurate and "over-amp'd," and opined that the aircraft had actually been separated by 1500-2000 feet horizontally and 200-300 feet vertically. (Tr. 241.)

The law judge dismissed the section 91.113(f) charge (failure of an overtaking aircraft to give way to the overtaken aircraft) at the conclusion of the Administrator's case-in-chief, finding that respondent was not an overtaking aircraft but rather, was the overtaken aircraft. In his initial decision, he commented in dicta that, in his opinion, Mr. Lally was in violation of section 91.113(f) and if this had been a comparative negligence action he would have found Mr. Lally 80% at fault in this incident. In spite of his belief that Mr. Lally was also culpable, the law judge nonetheless found that respondent had violated section 91.113(d) (failure to give way to an aircraft on the right when converging), section 91.111(a) (creation of a collision hazard), and section 91.13(a) (careless or reckless operation). The law judge reduced the requested sanction from a 180-day suspension to a 90-day suspension based on his dismissal of the 91.113(f) charge and his belief that the FAA did not intend to pursue an enforcement action against Mr. Lally.[9]

On appeal, respondent argues that because he had the right-of-way as the overtaken aircraft pursuant to section 91.113(f), he was entitled to assume that Mr. Lally would pass well clear as

[9] Testimony given by the FAA's investigating inspector in the subsequent enforcement action against respondent (SE-13003) confirms that no action was pursued against Mr. Lally as a result of this incident. The Administrator has not appealed from the law judge's reduction in sanction.

required by that rule. Accordingly, respondent reasons that he was not required by section 91.113(d) to give way to Mr. Lally as their aircraft converged. He cites Administrator v. Kuhn, 13 CAB 139 (1949), aff'd, Kuhn v. CAB, 183 F.2d 839 (1950), in which the Civil Aeronautics Board stated that the directional relation of two planes and their respective courses at the point of intersection are not the sole determinant of whether a situation involves an overtaking or a convergence.[10] Respondent also asserts that he cannot be held responsible for violating section 91.111(a), claiming that the collision hazard, if any, was created by Mr. Lally's violation of his right-of-way. In the alternative, respondent asserts that the aircraft did not come close enough to create a collision hazard, and argues that the radar data is a more reliable indicator of their proximity than the "subjective" eyewitness testimony relied upon by the law judge.

Respondent's position, essentially, is that his claimed right-of-way as an overtaken aircraft and Mr. Lally's obligation

[10] The CAB concluded that Kuhn involved an overtaking and not a convergence, despite the fact that the aircraft collided at an angle of 74 degrees, because the pilot of the faster aircraft, though on the right and thus arguably entitled to the right-of-way under the rules of convergence, knew that he would ultimately pass the slower aircraft ahead of him *and the other aircraft had no such knowledge.* This rationale cannot be applied in the instant case because the aircraft on the left (respondent) clearly knew that the other aircraft was approaching and might well present a conflict. We think it is significant also that the two aircraft in Kuhn were following roughly the same track, whereas the aircraft in this case were not. Finally, we note the CAB's recognition that the facts and circumstances of each individual case must be considered in determining whether a given situation constitutes an overtaking or a convergence.

to honor that right-of-way pursuant to section 91.113(f) pre-empts respondent's regulatory obligation under section 91.113(d) to give way to a converging aircraft on the right, and his obligation under 91.111(a) to avoid operating an aircraft so close to another aircraft as to create a collision hazard. We agree with the law judge, however, that all of these regulatory requirements can operate simultaneously. Indeed, the extra margin of safety that such potential redundancy provides is consistent with the overriding purpose of the regulations: to promote safety in flight.

Regarding the proximity of the two aircraft, we find no error in the law judge's acceptance of the participants' estimates of that distance, especially respondent's own statements to the FAA following the incident. As noted above, limitations on the computerized recordation of radar data suggest that those eyewitness estimates, though not confirmed by the radar data, might still be accurate. In any event, proximity is not the only relevant consideration in determining whether a collision hazard exists. The fact that an experienced pilot feels compelled to take evasive action to avoid a collision is itself acceptable evidence of a potential collision hazard.[11] In

[11] Administrator v. Tamargo, NTSB Order No. EA-4087 (1994) (50-foot separation); Administrator v. Willibanks, 3 NTSB 3632 (1981) (1000-foot lateral and 500-foot vertical separation). See also, Administrator v. Werner, 3 NTSB 2082 (1979) (fact that respondent's aircraft may not have come closer than 3000 feet is not grounds for reversing a charge of careless or reckless operation when a highly experienced pilot felt respondent was close enough to prompt him to take evasive action so as not to have a midair collision).

this case respondent's co-pilot indicated his concern that the two aircraft might collide if respondent did not turn, and respondent concedes that he ultimately took evasive action by lowering the nose of the aircraft as Mr. Lally passed by. In our judgment, however, considering the circumstances of this case -- including the apparent history of hostility between the two pilots involved -- that evasive action came too late to avoid a regulatory violation of section 91.111(a).

In short, we hold that respondent is accountable for his failure to give way to what was clearly a converging aircraft on his right and for his failure to avoid a collision hazard. He is not exculpated merely because Mr. Lally may also have been at fault in the incident.[12] Accordingly, we affirm the law judge's findings that respondent violated sections 91.113(d), 91.111(a), and 91.13(a).

Finally, we address respondent's claim that the law judge erred in denying his motion to suppress Mr. Allen's testimony and affidavit in this case. Respondent asserts that this evidence was obtained through unethical conduct on the part of counsel for the Administrator and, therefore, should not have been admitted. Specifically, respondent claims that counsel for the

[12] See Administrator v. Blaisdell, 6 NTSB 88 (1988) (fact that the other pilot could have ended the collision hazard does not excuse respondent's heedless creation of a dangerous situation in which the other aircraft was an unwitting participant); and Administrator v. Blanc, NTSB Order No. EA-4112 (1994) (though other pilot may not be blameless, Board noted that the sole issue before it is whether the respondent in the instant action is in violation of the regulations).

Administrator had improper direct contact with Mr. Allen at a time when he was represented by counsel (the same attorney representing respondent in this matter), in that he provided Allen with a copy of the FAA's investigative file pertaining to the then-pending enforcement case against Allen in response to his request for that information pursuant to the Freedom of Information Act (FOIA).

After retaining different counsel, Mr. Allen provided the Administrator with an affidavit setting forth his description of the events here at issue. The enforcement case against Mr. Allen was subsequently withdrawn, and the Administrator presented Allen's affidavit and testimony in the instant case against respondent.

The law judge denied respondent's motion to suppress, finding that he had no power to address the issue. (Tr. 17-18.) Respondent seeks a remand so that the merits of his motion can be addressed. However, a remand for this purpose is not necessary because the law judge's denial of the motion is supportable on other grounds. First, it does not appear that the complained of contact was unethical. As explained by counsel for the Administrator at the hearing, he was required under the FOIA to provide the requested information, even though the requesting party was represented by counsel.[13] Pre-trial documents filed by the Administrator also indicate that it was Allen who initiated

[13] The Administrator apparently provided a copy of the file to Allen's then-counsel as well.

the contact with the attorney for the Administrator, and that the attorney refused to discuss the substance of the case with Allen.

Furthermore, even assuming the contact was somehow unethical, and assuming that Allen's affidavit and testimony were somehow a result of that contact, we are unable to perceive any prejudice resulting to respondent therefrom. Respondent had the opportunity to challenge Allen's version of the events at the hearing. Moreover we think that, even without Allen's testimony in this case, the record would contain enough evidence to support the violations affirmed by the law judge.

SE-13003

This enforcement action was based on three separate incidents in which respondent allegedly failed to abide by various right-of-way rules, operated his aircraft (the same CASA C-212 involved in the previous enforcement action) so close to another as to create a collision hazard, and operated his aircraft in a careless or reckless manner. The incidents were reported to the FAA by Thomas Bishop, an experienced airline pilot and parachute drop pilot who does not normally operate out of Zephyrhills airport, but who was hired by a skydiving operator (the same competitor who employed Mr. Lally in the previous action, discussed above) to conduct parachute drops in his DC-3 aircraft during a special skydiving event held on August 1 and 2, 1992.

Mr. Bishop and his son (who flew the DC-3 along with his father on the flights at issue), described the three incidents as

follows:

> "Incident I" On August 1, 1992, at approximately 13,500 feet, respondent approached the Bishops' aircraft head-on without altering his course, requiring the Bishops to make a steep right turn to avoid respondent's aircraft.
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> "Incident II" On August 2, 1992, respondent operated his aircraft approximately 30 feet above the Bishop aircraft as he landed on a runway which the Bishop aircraft was still taxiing on after its landing in the opposite direction. At the hearing respondent admitted that he heard, but basically ignored, Mr. Bishop's request over the Unicom frequency that respondent slow his approach speed or go around so that Bishop could clear the runway.
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> "Incident III" On August 2, 1992, while the Bishop aircraft was climbing out after a takeoff, respondent headed towards the same runway for a landing in the opposite direction, approaching the Bishops' aircraft head-on without altering course, requiring the Bishops to make a right turn to avoid respondent's aircraft.

Respondent essentially denied that the incidents occurred as described. The law judge, however, credited the testimony of the Bishops over respondent's contrary description of events. He characterized respondent's testimony as "glib, rehearsed, and patronizing." (Initial decision at 15.) He found that respondent had violated sections 91.13(a), 91.111(a), and 91.113(b) in connection with each of the three incidents; section 91.113(e) in connection with incidents I and III; and section 91.113(g) in connection with incident II.

On appeal, respondent argues that the law judge erred in refusing to draw an adverse inference against the FAA based on its failure to preserve and produce the ATC voice and radar tapes which could have shown the relative positions of the two aircraft during incident I. He further argues that the Bishops' testimony regarding that incident is contradicted by a videotape introduced

by respondent purporting to show that the Bishop aircraft turned into the CASA's flight path, and maintains that if a collision hazard existed it was created by the Bishops. Regarding incident II, respondent points out what he believes were inconsistencies in the Bishops' descriptions of where they were located on the runway when the alleged overflight occurred, and repeats his position (rejected by the law judge) that the Bishop aircraft was no longer on the runway itself when he landed. Finally, respondent claims that the collision hazard, if any, in incident III was a result of the Bishops' failure to honor his right-of-way as a landing aircraft pursuant to section 91.113(g).

After careful consideration of the entire record in this case, we conclude that respondent has identified no error in the initial decision, and we adopt the law judge's factual findings and legal conclusions as our own.[14] His 22-page written initial decision addresses all of the important points in this litigation, including those raised by respondent's appeal. Accordingly, only a brief discussion of those points is necessary

[14] Respondent makes much of the fact that the law judge, on pages 18-20 of his initial decision, made reference to a C-130 aircraft, claiming that, because no such aircraft was involved in this case, these references "demonstrate[d] the law judge's feeble grasp of the record before him." (App. Br. at 10.) It is clear, however, from the context of the references that the law judge was discussing the Bishops' DC-3, which he had correctly identified as such up until page 18 of his initial decision. We think it is beyond question that the erroneous references are simply a typographical error, and do not evidence a lack of understanding of the record. Further, we think that respondent's disparaging comments regarding what he perceives as weaknesses in the law judge's factual and legal analysis are undeserved and inappropriate.

here.

The law judge found no evidence that the FAA acted contrary to regulation or procedure in failing to preserve the ATC tapes at issue in response to Mr. Bishop's verbal request that the tapes be saved.[15] In view of the absence of bad faith on the part of the FAA and the speculative value of the tape and radar data, he declined to draw the requested adverse inference against the Administrator.[16] Regarding the videotape purporting to depict incident I which was offered by respondent, the law judge noted that, even if the aircraft shown on that tape was Bishop's DC-3, the video -- which contains only a few seconds of footage showing an aircraft banking to the right and heading in the general direction of the CASA -- showed only that on one occasion the two aircraft did not approach each other head-on. (Initial decision at 16.)

Further, the law judge correctly recognized that the Bishops' failure to see the CASA and take evasive action earlier during incident I did not relieve respondent of his independent regulatory obligations. Similarly, with regard to incident III,

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[15] The Administrator claims that ATC tapes are saved only in connection with written complaints, explaining that it would be unduly burdensome to preserve ATC data every time verbal requests are received. By the time captain Bishop submitted his written complaint to the FAA, the standard 15-day retention period for those tapes had expired and the tapes were no longer available. (Tr. I, 232; Tr. II, 85.)

[16] See Administrator v. Latham, NTSB Order No. EA-3873 at 6-7 (1993) (Board found no basis for drawing an adverse inference against the Administrator for failure to preserve computer tracking data because there was no evidence to suggest he intentionally withheld or destroyed such evidence).

the law judge held that even though the Bishops should have seen respondent's aircraft coming in for a landing, and despite respondent's right-of-way as a landing aircraft under section 91.113(g), respondent's "obstinate refusal in th[at] situation to alter his course in the face of the obvious danger to lives and property . . . is a clear example of reckless operation." (Initial decision at 20.)[17]

Respondent's remaining arguments consist mainly of attacks on the law judge's credibility findings. However, we have long held that we will not overturn a law judge's credibility finding unless the law judge acted arbitrarily, capriciously, or the result is incredible or against the overwhelming weight of the evidence,[18] factors which are not present in this case.

[17] As noted in connection with our discussion of SE-12841, above, more than one right-of-way rule may be applicable to a given situation. Here, respondent's right-of-way as a landing aircraft did not modify his duty to alter course to the right when approaching another aircraft head-on, or his duty to avoid a collision hazard.

[18] See, e.g., Administrator v. Wilson, NTSB Order No. EA-4013 at 4-5 (1993).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeals are denied;

2. The initial decisions are affirmed; and

3. The 90-day suspension of respondent's pilot certificate ordered in SE-12841 and the 270-day suspension of respondent's pilot certificate ordered in SE-13003 are affirmed.[19] The 360-day suspenson of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[20]

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[19] Though we have addressed both of these enforcement actions in a single decision, we wish to emphasize that we have evaluated the cases independently, and have not considered respondent's violations in the first action to be a violation history which would justify a harsher sanction in the second action.

[20] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).